

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CRL. REV.P. 570/2013, CRL.M.(BAIL) 2045/2013,
CRL.M.A Nos. 16098/2013 & 1619/2015**

% Reserved on: 03.07.2015
Date of Decision:07.07.2015

MANOJ JAIN

..... Appellant

Through: Dr. Ashwani Bhardwaj, Adv.

Versus

SURINDER KUMAR JAIN & ANR Respondent

Through: Mr. S.K. Jain & Ms. Khushboo
Bhardwaj, Adv.

CORAM:

HON'BLE MR. JUSTICE ASHUTOSH KUMAR

ASHUTOSH KUMAR, J:

1. The Petitioner impugns the judgment and order of conviction dated 25.02.2012/28.02.2012 passed by the Ld. Trial Court in Complaint case no. 36/08/12 whereby the Petitioner was convicted for the offence under Section 138 of Negotiable Instrument Act, 1881 and was sentenced to undergo Simple Imprisonment for a period of one year and to pay a fine, with a default clause, of Rs. 3 lakhs out of which Rs.2.50 lakhs to be paid to the Respondent as compensation or suffer Simple Imprisonment for 2 months, as well as the Appellate Court judgment passed in Criminal Appeal no. 4/2012 on 30.08.2013 which upheld and affirmed the judgment and order of conviction passed by the Trial Court.

2. A complaint was filed by Surinder Kumar Jain under Section 138 Negotiable Instruments Act, 1881 against the Petitioner, stating therein, inter alia, that because of old acquaintance, a loan of Rs. 1,50,000/- was given to the Petitioner in October 2006, to be repaid after one year with interest at the rate of 15% per annum.

3. The Petitioner issued a cheque of Rs. 1,50,000/- (Ex.CW1/1) towards full and final settlement of the loan amount. The cheque could not be honoured because of “Insufficient Funds”. The notice to the Petitioner dated 23.04.2008, was returned with a note that the addressee had “left without address”. However, UPC was served on the Petitioner.

4. The notice was neither replied to nor complied with by the Petitioner. Hence the complaint.

5. During trial, the Petitioner took a specific defence that the cheque (Ex.CW1/1) was stolen by the Respondent from his shop and was misused. He also took the plea that the mandatory notice was deliberately issued to him on a wrong address. Lastly, he took the plea that the Respondent could not establish any debt or other liability even though the Petitioner discharged the initial burden of rebutting the presumption of any debt or liability. Similar statement was made by him under Section 313 of the Cr. PC.

6. The Petitioner also examined a defence witness namely Ankush Jain (DW1), who supported the contention of the Petitioner about the theft of the cheque in the year 2008.

7. The Trial Court, held the Petitioner guilty by holding that he could not rebut the presumption under Section 118(a) and Section 139 of the Negotiable Instruments Act, as also the presumption under Section 27 of the General Clauses Act with regard to service of legal notice.

8. In appeal, the same sets of grounds were taken by the Petitioner. The appeal, too, was dismissed and the judgment and order of the Trial Court was upheld.

9. From the perusal of the records, it appears that the defence of the Petitioner, that the cheque in question was stolen, is palpably false. Ankush Jain (DW1) has stated that the cheque was found missing in between 27th and 28th of February, 2008 and it was discerned only after a day. Thus, the story of the Petitioner, that he wrote to the SHO of the concerned police station, in the year 2007, about the theft of the cheque, therefore, falls to the ground.

10. The Trial Court as well as the Appellate Court, rightly held that the defence of the Petitioner was unbelievable.

11. Another contention of the Petitioner, is that the Respondent could not establish any legally enforceable debt or liability, as admittedly he is not an Income Tax payee, whereas Section 269 SS of the Income Tax Act mandates that any loan or deposit of more than Rs. 20,000/- is to be made by account payee cheque or bank draft. It was urged that the Respondent could not establish the source of the

funds and it is really doubtful that such huge amount of loan was given to the Petitioner without any documentation.

12. Both the courts below have, justifiably, held that the provisions of Section 269 SS of the Income Tax Act does not help the Petitioner as he did not cross examine the Respondent about the source of his income or his financial strength. Since friendly loan was given, the Respondent did not prepare any document. There is nothing on record, and no attempt has also been made by the Petitioner, to doubt the financial strength of the Respondent to advance loan.

13. The Petitioner could not prove to the contrary, the presumption that the cheque was issued by the Petitioner in discharge of the debt. The Petitioner, by taking a plea of theft of signed cheque, which plea was held to be false, could not rebut the presumption in favour of the holder (Respondent No.1), as required under Section 139 of the Negotiable Instruments Act.

14. The assertion of the Petitioner that the demand notice (Ex.PW1/3), was not received by him as it was sent on a wrong address is incorrect. The summons by the court which were also sent at the same address, were received by him. The notice which was sent by UPC did not return, indicating that it was served. Thus, both the courts below rightly held that notice was validly served.

15. In *Krishna Janardhan Bhat vs. Dattatreya Hegde* (2008) 4 SCC 54, the law with respect to the burden of proof while dealing with the presumption under Section 39 of the Negotiable Instruments Act, has

been succinctly adumbrated. The relevant portion of the said judgment is being reproduced herein below:

“32. An accused for discharging the burden of proof placed upon him under a statute need not examine himself. He may discharge his burden on the basis of the materials already brought on record. An accused has a constitutional right to maintain silence. Standard of proof on the part of an accused and that of the prosecution in a criminal case is different.

33. In Bharat Barrel & Drum Mfg. Co. v. Amin Chand Payrelal [(1999) 3 SCC 35] interpreting Section 118(a) of the Act, this Court opined: (SCC pp. 50-51, para 12)

“12. Upon consideration of various judgments as noted hereinabove, the position of law which emerges is that once execution of the promissory note is admitted, the presumption under Section 118(a) would arise that it is supported by a consideration. Such a presumption is rebuttable. The defendant can prove the non-existence of a consideration by raising a probable defence. If the defendant is proved to have discharged the initial onus of proof showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus would shift to the plaintiff who will be obliged to prove it as a matter of fact and upon its failure to prove would disentitle him to the grant of relief on the basis of the negotiable instrument. The burden upon the defendant of proving the non-existence of the consideration can be either direct or by bringing on record the preponderance of probabilities by reference to the circumstances upon which he relies. In such an event, the plaintiff is entitled under law to rely upon all the evidence led in the

case including that of the plaintiff as well. In case, where the defendant fails to discharge the initial onus of proof by showing the non-existence of the consideration, the plaintiff would invariably be held entitled to the benefit of presumption arising under Section 118(a) in his favour. The court may not insist upon the defendant to disprove the existence of consideration by leading direct evidence as the existence of negative evidence is neither possible nor contemplated and even if led, is to be seen with a doubt.”

(emphasis supplied)

34. *Furthermore, whereas prosecution must prove the guilt of an accused beyond all reasonable doubt, the standard of proof so as to prove a defence on the part of an accused is “preponderance of probabilities”. Inference of preponderance of probabilities can be drawn not only from the materials brought on record by the parties but also by reference to the circumstances upon which he relies.*

35. *A statutory presumption has an evidentiary value. The question as to whether the presumption stood rebutted or not, must, therefore, be determined keeping in view the other evidence on record. For the said purpose, stepping into the witness box by the appellant is not imperative. In a case of this nature, where the chances of false implication cannot be ruled out, the background fact and the conduct of the parties together with their legal requirements are required to be taken into consideration.*

36. *In M.S. Narayana Menon v. State of Kerala [(2006) 6 SCC 39: (2006) 3 SCC (Cri) 30] it was held that once the accused is found to discharge his initial burden, it shifts to the complainant.*

37. Four cheques, according to the accused, appear to have been drawn on the same day. The counterfoil of the chequebook, according to the appellant, was in the handwriting of R.G. Bhat wherein it was shown that apart from other payments, a sum of Rs 1500 was withdrawn on a self-drawn cheque. The courts below proceeded to hold that the defence raised by the appellant has not been proved, which, in our opinion, is not correct. He did not know that the said cheque had not been encashed. He replied to the notice thinking that one of the cheques has been misused. There is nothing on record to show that he knew that one of the cheques was still with R.G. Bhat.

38. Disputes and differences between him and R.G. Bhat stood established by admission of the respondent himself. Similar industry was being run by R.G. Bhat although he was acting as the constituted attorney of the appellant. According to the appellant, R.G. Bhat had cheated him. The counterfoil showed that not more than Rs 20,000 had ever been withdrawn from that Bank at a time. The courts were required to draw an inference as to the probability of the complainant's advancing a sum of Rs 1.5 lakhs on mere asking and that too without keeping any documentary proof. Even there was no witness. The purported story that the appellant would himself come forward to return the amount by a cheque knowing fully well that he did not have any sufficient funds is difficult to believe.

39. In K. Prakashan v. P.K. Surenderan [(2008) 1 SCC 258: (2008) 1 SCC (Cri) 200: (2007) 12 Scale 96] this Court following M.S. Narayana Menon [(1999) 3 SCC 35] opined: (K. Prakashan case [(2006) 6 SCC 39: (2006) 3 SCC (Cri) 30], SCC p. 263, paras 13-14)

“13 [12]. The Act raises two presumptions: firstly, in regard to the passing of consideration as

contained in Section 118(a) therein and, secondly, a presumption that the holder of cheque receiving the same of the nature referred to in Section 139 discharged in whole or in part any debt or other liability. Presumptions both under Sections 118(a) and 139 are rebuttable in nature. Having regard to the definition of terms 'proved' and 'disproved' as contained in Section 3 of the Evidence Act as also the nature of the said burden upon the prosecution vis-à-vis an accused it is not necessary that the accused must step into the witness box to discharge the burden of proof in terms of the aforementioned provision.

14 [13]. It is furthermore not in doubt or dispute that whereas the standard of proof so far as the prosecution is concerned is proof of guilt beyond all reasonable doubt; the one on the accused is only mere preponderance of probability.”

40. *In John K. John v. Tom Varghese [(2007) 12 SCC 714: JT (2007) 13 SC 222] this Court held: (SCC p. 717, para 11)*

“11 [10].... The High Court was entitled to take notice of the conduct of the parties. It has been found by the High Court as of fact that the complainant did not approach the Court with clean hands. His conduct was not that of a prudent man. Why no instrument was executed although a huge sum of money was allegedly paid to the respondent was a relevant question which could be posed in the matter. It was open to the High Court to draw its own conclusion therein. Not only had no document been executed, even no interest had been charged. It would be absurd to form an opinion that despite knowing that the respondent was not even in a position to discharge his burden

to pay instalments in respect of the prized amount, an advance would be made to him and that too even after institution of three civil suits. The amount advanced even did not carry any interest. If in a situation of this nature, the High Court has arrived at a finding that the respondent has discharged his burden of proof cast on him under Section 139 of the Act, no exception thereto can be taken.”

41. *Mr Bhat relied upon a decision of this Court in Hiten P. Dalal v. Bratindranath Banerjee [(2001) 6 SCC 16: 2001 SCC (Cri) 960] wherein this Court held: (SCC pp. 24-25, paras 22-23)*

“22. ... Presumptions are rules of evidence and do not conflict with the presumption of innocence, because by the latter, all that is meant is that the prosecution is obliged to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduces evidence showing the reasonable possibility of the non-existence of the presumed fact.

23. In other words, provided the facts required to form the basis of a presumption of law exist, no discretion is left with the court but to draw the statutory conclusion, but this does not preclude the person against whom the presumption is drawn from rebutting it and proving the contrary. A fact is said to be proved when,

‘after considering the matters before it, the court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists’.

Therefore, the rebuttal does not have to be conclusively established but such evidence must be adduced before the court in support of the defence that the court must either believe the defence to exist or consider its existence to be reasonably probable, the standard of reasonability being that of the 'prudent man'."

(See also K.N. Beena v. Muniyappan [(2001) 8 SCC 458: 2002 SCC (Cri) 14] .)

42. *We assume that the law laid down therein is correct. The views we have taken are not inconsistent therewith."*

16. After espousing the law in this regard, the Supreme Court also took note of certain other aspects namely, presumption of innocence being a human right and the requirement of a cautious approach in determining the compatibility between the concepts of reverse burden and presumption of innocence. The above noted elucidation is as follows:

“44. *The presumption of innocence is a human right. (See Narendra Singh v. State of M.P. [(2004) 10 SCC 699: 2004 SCC (Cri) 1893], Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra [(2005) 5 SCC 294: 2005 SCC (Cri) 1057] and Rajesh Ranjan Yadav v. CBI [(2007) 1 SCC 70: (2007) 1 SCC (Cri) 254].) Article 6(2) of the European Convention on Human Rights provides: “Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.” Although India is not bound by the aforementioned Convention and as such it may not be necessary like the countries forming European countries to bring common law into land with the*

*Convention, a balancing of the accused's rights and the interest of the society is required to be taken into consideration. In India, however, subject to the statutory interdicts, the said principle forms the basis of criminal jurisprudence. For the aforementioned purpose the nature of the offence, seriousness as also gravity thereof may be taken into consideration. The courts must be on guard to see that merely on the application of presumption as contemplated under Section 139 of the Negotiable Instruments Act, the same may not lead to injustice or mistaken conviction. It is for the aforementioned reasons that we have taken into consideration the decisions operating in the field where the difficulty of proving a negative has been emphasised. It is not suggested that a negative can never be proved but there are cases where such difficulties are faced by the accused e.g. honest and reasonable mistake of fact. In a recent article *The Presumption of Innocence and Reverse Burdens: A Balancing Duty* published in 2007 CLJ (March Part) 142 it has been stated:*

“In determining whether a reverse burden is compatible with the presumption of innocence regard should also be had to the pragmatics of proof. How difficult would it be for the prosecution to prove guilt without the reverse burden? How easily could an innocent defendant discharge the reverse burden? But courts will not allow these pragmatic considerations to override the legitimate rights of the defendant. Pragmatism will have greater sway where the reverse burden would not pose the risk of great injustice—where the offence is not too serious or the reverse burden only concerns a matter incidental to guilt. And greater weight will be given to prosecutorial efficiency in the regulatory environment.”

45. We are not oblivious of the fact that the said provision has been inserted to regulate the growing business, trade, commerce and industrial activities of the country and the strict liability to promote greater vigilance in financial matters and to safeguard the faith of the creditor in the drawer of the cheque which is essential to the economic life of a developing country like India. This, however, shall not mean that the courts shall put a blind eye to the ground realities. Statute mandates raising of presumption but it stops at that. It does not say how presumption drawn should be held to have rebutted. Other important principles of legal jurisprudence, namely, presumption of innocence as human rights and the doctrine of reverse burden introduced by Section 139 should be delicately balanced. Such balancing acts, indisputably would largely depend upon the factual matrix of each case, the materials brought on record and having regard to legal principles governing the same.”

17. The factual background, the relationship of the parties and the amount of loan are some of the indices to definitely come to the conclusion, that the petitioner could not rebut the presumption in favour of the Respondent being the holder of the cheque. The Petitioner was in debt and the cheque in question was issued for discharge of that debt.

18. The reception of evidence, the appreciation of law and its application to the facts of the present case by the Trial Court and the Appellate Court cannot be faulted with.

19. This court sees no reason to interfere with the concurrent finding of guilt, as also the sentence imposed on the Petitioner.

20. The alternative oral prayer of the Petitioner, of modifying the sentence to the extent of the period undergone by him as he has remained in custody for a major part of the sentence, does not merit any consideration.

21. This revision petition must fail. Consequently, this petition is dismissed.

22. In view of the aforementioned findings, the remaining applications in the Revision petition are disposed of as having become infructuous.

23. The Revision petition is disposed of accordingly.

(ASHUTOSH KUMAR)
Judge

JULY 07, 2015
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